Supreme Court of the United States

OCTOBER TERM 19

No.

ELIZABETH ANNAL

Petitioner

vs.

DANIEL P. BEARD, WARREN L. HAMILTON and UNITED STATES OF AMERICA

Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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No.

ELIZABETH ANNAT,

Petitioner,

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A

The decision of the United States Court of Appeals for the Fifth Circuit herein sought to be reviewed is reported at 277 F.2d 554, and comprises pages 172-184 of the Transcript of Record. The opinion of the United States District Court for the Southern District of Florida has not been reported, but is contained on pages 157-159 of the Transcript of Record.

B.

The judgment sought to be reviewed was entered April 26, 1960. The statutory provision believed to confer jurisdiction on this court to review by certiorari this judgment is Title 28, §1254(1), U. S. C. A.

C.

The question presented for review is whether or not a land owner can be barred from ejecting a federal officer from possession of her land by the doctrine of res judicata based upon condemnation judgments, wherein said land had not been condemned nor compensation paid. Can the United States originally acquire title to land in a condemnation suit without taking and without compensation in view of the constitutional prohibitions against the taking of private property for a public use without compensation?

D.

Florida Statutes, 1959 Volume 3, page 3380

CONSTITUTION OF THE STATE OF FLORIDA
DECLARATION OF RIGHTS

Section 12. Double jeopardy, self-incrimination; eminent domain; right to work. — No person shall ****** be deprived of life, liberty or property without due process of law; nor shall private property be taken without just compensation. *****

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall * * * * be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. * * * * nor shall any State deprive any person of life, liberty or property, without due process of law * * * * *.

Florida Statutes, 1959, Volume 1, page 261

Section 70.01 Common law, ejectment abolished. In actions of ejectment it shall not be necessary to have any fictitious parties to the suit, but the party plaintiff may bring his suit directly against the party in possession or the one claiming adversely.

Section 70.03. Pleadings, forms, etc.

(1) COMPLAINT. The complaint shall only contain a plain statement of the cause of action to entitle the plaintiff to recover the land in controversy, together with mesne profits. It may be in the following form, to-wit:

"In the Circuit Court of Florida Circuit,
County, to-wit:

"A. B., by his attorney, sues C. D. in an action of ejectment: Because the defendant is in possession of a

certain tract or parcel of land, situated, lying and being in said county, known and described as follows, to-wit: Here describe the land, containing about ... acres, to which said plaintiff claims title; and the defendant has received the profits of said land since the ... day of ..., A. D. ..., of the yearly value of ... dollars and refuses to deliver possession of said land to the said plaintiff, or to pay him the profits thereof."

(2) ANSWER. The defendant's answer shall specify the allegation or allegations of the complaint with which he takes issue, whether the same be plaintiff's title to the lands in controversy, defendant's possession, or otherwise.

Section 7005. Verdict and judgment.

(1) VERDICT. A verdict for the plaintiff shall state the quantity of the estate of the plaintiff, and describe the land by its metes and bounds, by the number of the lot or other certain description.

(2) JUDGMENT. The judgment awarding possession shall in like manner state the quantity of the estate and give a description of the land recovered.

E.

STATEMENT OF THE CASE

The judgment herein sought to be reviewed of the United States Court of Appeals for the Fifth Circuit is upon two appeals from the District Court of the United

States for the Southern District of Florida, Miami Division, consolidated for briefing, argument and decision (R-170). The two causes were an ejectment action against a federal officer in possession of the Plaintiff's land (R-3), brought in the state court but removed to the federal court (R-1), and a subsequent Motion to relieve the ejectment Plaintiff from a condemnation judgment entered some years previously ex parte and without her knowledge that purported to quiet title to the ejectment land in the United States (R-141). The District Court decided both causes adverse to Elizabeth Annat, as Plaintiff in the ejectment suit (R-25, 26), and Movant in the condemnation case (R-157). The Circuit Court of Appeals affirmed (R-172).

Both of the courts below recognized the harshness and injustice of their decisions. The District Court stated (R-157) that although Elizabeth Annat can show that she was deprived of her land without compensation, "she cannot at this time seek relief", and that although there is an obvious hardship on her she had forfeited her right to compensation for her property (R-159). The Circuit Court of Appeals affirmed on the principle of res judicata, "unfortunate as it may appear in this particular case" (R-182).

The material facts involved are many, going back over a long period of years, but they are not in dispute and are outlined below in chronological order:

1. Elizabeth Annat acquired from the estate of her husband some thirty years ago a vast contiguous tract of land in the Florida Everglades containing over thirty thousand acres. The parcel ran from Ingraham Highway

on the North to Florida Bay on the South as a solid block approximately five miles wide and twelve miles long, in Range 36 East Townships 59, 60, and 61 South, Dade County, Florida. There were few surveys in the area by reason of the terrain, and the maps of this section of Florida by which land was acquired, held and sold showed the sections to be one mile wide (from east to west) and one and one quarter miles long (from north to south), containing 800 acres.

2. After the maps had been in use and existence some forty to fifty years, the Land Acquisition Office in Washington prepared a new map of the area depicting all sections as being one mile square, containing 640 acres. The 160 acres left over from each section were put in "hiatuses" and labeled as "½ Townships. The Annat hiatus was styled Township 59½ and is shown as a blank space cutting through the center of her property (R-57). This blank contains approximately 8,000 acres.

3. Shortly thereafter, the United States, using this new map as its lease map, filed a Petition for Condemnation in the District Court for the Southern District of Florida seeking to condemn the Everglades National Park, naming 69 odd defendant Landowners, among them Elizabeth Annat. The Petition was amended, a Declaration of Taking filed and Judgment entered on the Declaration of Taking before the defendants answered. The status of the original Annat parcel at this stage of the proceedings was thus:

a. The title to the northern portion labeled "Tract 317" (See map on page 57 of Record) had vested in the United States by reason of its inclusion in the Declaration

of Taking, estimated compensation therefor deposited with the right thereto vested in Elizabeth Annat as alleged owner thereof.

4. The title to the southern portion labeled "Tract 257" had also vested in the United States for the same reason of being included in the Declaration of Taking.

5. The United States had alleged itself to be the owner of the center portion in its amended Petition, labeling the Annat hiatus as part of "Tract 268", and accordingly it was not included in the Declaration of Taking, no estimated compensation deposited, nor was it touched upon in any way by the Judgment on the Declaration of Taking.

4. The next proceedings in the condemnation suit was a pre-trial map hearing to determine what map would be used to locate the lands involved under the Declaration of Taking, or, was the Government's base map, although not based upon a survey, accurate to locate any given parcel on the ground? This hearing resulted in an Order (R-73) adopting the Government's map to the exclusion of any other map for use at the jury trial of the issue of just compensation.

5. At the jury trial of the issue of just compensation, Elizabeth Annat was awarded compensation for the two portions of her land included in the Declaration of Taking, and a Final Judgment was entered as to those two tracts (R-81), the hiatus land being in no way involved.

6. About a year later another Final Judgment was

entered (R-100) by the District Court ex parte and without notice to any of the landowners wherein it was found that as to a number of tracts including 268 (the Annat hiatus) "the allegations of the Petition for Condemnation, as amended, are true" and that said tracts had been conveyed by the State of Florida to the United States. This is the only reference in the entire record of the cause that purports to adjudicate anything concerning the hiatus lands, and the existence of this judgment was not known to Elizabeth Annat until long after the period in which to appeal had run.

7. One year later (April 15, 1954) the Circuit Court of Appeals for the Fifth Circuit reversed the judgment awarding compensation to other defendants who had appealed, on the ground that they had not received compensation for as large a quantity of land as they owned in the park area, the Court holding that the State of Florida owned no land within the park to convey to the United States, **Paradise Prairie Land Co. v. United States,** 212 F. 2d 170. The last final judgment in the cause referred to in paragraph 6 above was entered during the pendency of the appeal and its existence not made known to the Circuit Court of Appeals.

8. In 1955, before the United States would have acquired title to the Annat hiatus by adverse possession, Elizabeth Annat filed her ejectment action against Daniel B. Beard, the Superintendent of the Everglades National Park, who was in actual possession of the land; and filed a Motion under Rule 60, Fed. Rules Civ. Proc., to relieve her from any construction of the judgment of the District Court to the effect that the United States had title to the hiatus land.

The theory of Elizabeth Annat was that she owned a contiguous parcel of land for many years prior to the condemnation action by the United States for the Everglades National Park, and in said action the United States condemned and acquired the northern and southern portions of her land, but made no effort to and did not acquire the center portion. She asserted that the United States could not originally acquire title to any land in condemnation without paying compensation therefor nor could she be deprived of her property without compensation or due process of law, as the same would conflict with the United States Constitution and the Constitution of Florida.

Neither the District Court nor the Circuit Court of Appeals made mention of the constitutional aspects of the cause, but disposed of the litigation on the proposition that the judgment awarding her compensation for her land taken in the Declaration of Taking and the pretrial order adopting the government's map, had the result and effect that she did not own the flats, and therefore, although erroneous, she was barred by *res judicata* for failure to appeal.

Elizabeth Annat now brings this Petition for Writ of Certiorari asserting that she has been deprived of 8,000 acres of her land without compensation, which constitutes a denial of her constitutional rights.

ARGUMENT

In resisting the ejectment action and the motion for relief of Elizabeth Annat, *the United States never denied that Elizabeth Annat owned the flats prior to the condemnation action.* It was contended by the United States

and it is inherent in the decisions of both of the lower courts that the United States acquired title to the Annat hiatus in and by virtue of the condemnation action, or that Elizabeth Annat somehow had lost her title in the cause by forfeiture or otherwise. In either event, the result is the same, private property was taken for public use without compensation to the owner.

This is absolutely prohibited by the United States Constitution and the Constitution of the State of Florida.

The United States can show neither title to the land nor right to possession by virtue of the record. The land was not condemned, it was not included in the Declaration of Taking, there was no compensation deposited or paid, no trial as to its value, no order granting possession and no adjudication as to its ownership save and except an ex parte judgment entered without notice to or knowledge of the owner.

The lower courts found it necessary to resort to construing effects and results into the order adopting the map and the judgment awarding compensation for other land that on their face do not purport to be an adjudication of title either for the United States or against Elizabeth Annat as to the hiatus land.

The mere preparation of a map does not carry with it any title, nor would its introduction into evidence. The land remains the same regardless of how it is depicted on a map. The United States chose to prepare a new map and chose to condemn land in accordance with its own map, and accordingly acquired only that land it selected to include in its Declaration of Taking as shown by that

map. The United States cannot constitutionally acquire land not sought to taken upon a naked allegation of ownership and nothing more other than a prima facia showing that its map is accurate to show location and boundaries even though not based upon an actual survey on the ground.

It is respectfully submitted that the Circuit Court of Appeals for the Fifth Circuit has ignored the controling constitutional facet of this cause and that its decision herein sought to be reviewed is in logic and reason based upon a necessary premise that does violence to constitutional prohibitions against taking of private property for public use without compensation. Petitioner therefore prays that a Writ of Certiorari be granted to review said decision.

Respectfully submitted.

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By

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17811

ELIZABETH ANNAT,

Appellant,

versus

DANIEL B. BEARD and WARREN J. HAMILTON,

Appellees.

No. 17885

ELIZABETH ANNAT,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Southern District of Florida.

April 26, 1960

Before TUTTLE, JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: As a part of the land acquisition program for the Everglades National Park, the United States brought a condemnation suit against a number of owners of land in Dade County, Florida in May of 1950, and took possession of the land in December of that year. Among the defendants in that cause was Elizabeth Annat, the appellant here.[1] By its petition in condemnation the Government declared its purpose to take and acquire the lands within a described perimeter boundary which was contained in an exhibit incorporated into the petition. The land which is the subject of this controversy was within the perimeter description. By an amendment to its petition the United States stated that the lands within the perimeter boundary had been divided into numbered tracts, and the descriptions of these tracts and the supposed owners of such of them as the Government regarded as being in private ownership, were set forth. Tract 317, as described in the amendment, included part of Section 18, all of Section 19, and all of Sections 26 to 35, Township 59 South, Range 36 East. Tract 337 embraced most of Township 60 South, Range 26 East, and most of the mainland part of Township 61 South, Range 36 East. The amended petition attributed ownership of Tracts 317 and 337 to the Estate of Hugh Annat, the deceased husband of the appellant. The amendment described Tract 268 as "The Hiatus between Townships 59 and 60 South, in Ranges 35 and 36, East." It was alleged that the United States claimed title "to all lands which may be situate in any hiatuses created by reason of any

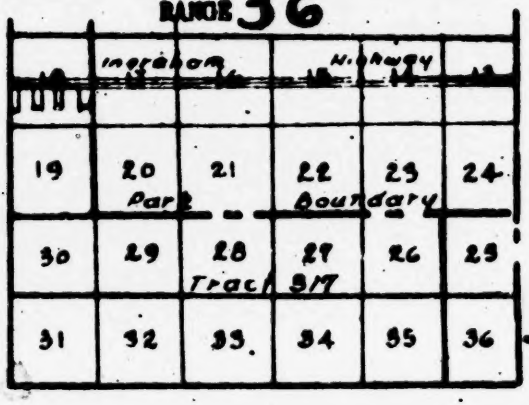
[1] The appellant Elizabeth Annat succeeded to whatever titles [illegible] Annat may have had at the time of his death.

erroneous surveys, projection plats, or other maps prepared for use in connection with any lands within the perimeter boundary of the Park". Tract 114 was described as "Any part or portion of lands lying on the mainland of Florida within the perimeter boundary of the Park, excepting, however, all those tracts of land hereinabove more particularly described." By her answer Mrs. Annat asserted ownership of and a right to compensation for lands described by reference to sections and parts of sections which were the same, with inconsequential variations, as those used by the Government in describing Tracts 317 and 337. Mrs. Annat's description closed with the clause, "containing 31,860 acres more or less."

The lands here involved and other lands in the condemnation suit were patented by the United States to the State of Florida. The State, acting through its agency, the Trustees of the Internal Improvement Fund, granted to the Florida East Coast Railway Company a large area of lands estimated to be 200,000 acres, in which was included all, except Section 16, of Township 59, Range 36, all, except Section 16, of Township 60, Range 36, and all, except Section 16, of Fractional Township 61, Range 36. Little had then been done in the way of surveying although some township lines had been established on the ground by the United States. The Model Land Company prepared and recorded a map, known as the Dooley Map, covering the lands in the grant of the State to the Railway Company. This map was not based on any actual survey. It showed section areas to be 800 acres rather than the conventional 640 acres. It showed the South line of Township 59 as being the North line of Township 60.

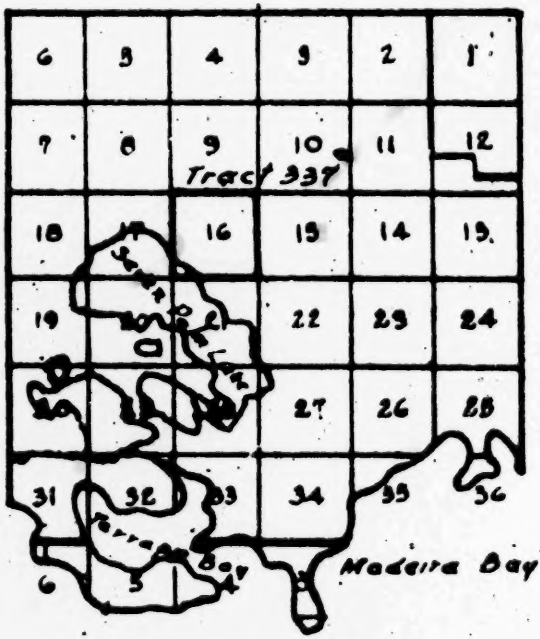
Shortly before the condemnation suit was filed, the Land Acquisition Office of the National Park Service prepared a map of the area and it was adopted by the Trustees of the Internal Improvement Fund "as an official survey." This map, like the Dooley Map, was not based on actual surveys. It showed section areas to be 640 acres in area with the result that there was a hiatus, nearly two and a half miles in width between Township 59 and Township 60, which was given the designation of Township 59-½. By the Dooley Map Tracts 317 and 337 were contiguous. By the new map these tracts were separated by the Township 59-½ hiatus. The hiatus, so shown, extended through Range 35 as well as Range 36 and was referred to in the condemnation case as Tract 268. The Annat land, as shown on this map, with so much of the Township 59-½ hiatus as is here involved, is thus depicted by one of the exhibits brought up to us from the district court:

RANGE 36



TOWNSHIP 59

TOWNSHIP 59½



TOWNSHIP 60

TOWNSHIP 61

The condemnation court held an extended pre-trial hearing for the purpose of ascertaining the method by which the location and area of each of the various parcels of land should be determined. Over the objection of counsel for several of the landowners, including counsel for Mrs. Annat, the court entered an order finding that the lands of the defendants could be located from and on the Government's map, referred to as Petitioner's Exhibit 1, so as to meet the requirements of determination of the issue of just compensation. By the order the court adopted Petitioner's Exhibit 1 to the exclusion of any other map showing or purporting to show the tracts of land being acquired by the Government. This order, in so far as it affected Mrs. Annat, reduced the area of the described lands which were being taken from her by approximately twenty percent, and showed the hiatus land. The Government took the position that the hiatus Tract 268 had not been previously conveyed by the State of Florida and was not within the description of the land acquired by Mrs. Annat. The Government claimed ownership of Tract 268 and other hiatus parcels under a blanket deed from the State of Florida covering the entire park area. On May 16, 1952, a verdict was returned for Mrs. Annat in the amount of $130,977, and at the same time verdicts for other landowners in varying amounts were brought in. On May 2[illegible], 1952, a judgment, which was captioned "Final Judgment" was entered. By it the jury awards were confirmed, it was declared that title to the lands described, including Tracts 317 and 337, had vested in the United States, and judgments were awarded to the named landowners, including Mrs. Annat, for the amount by which the awards exceeded the initial deposits. This judgment provided that the cause should be held

open for such further orders as might be necessary "to determine ownership of the several Tracts involved herein and to distribute the awards herein made." After this judgment was entered some of the defendants moved for a new trial on the ground that the adoption of Petitioner's Exhibit 1 as showing the location and area of the sections and townships was erroneous. On denial of the motion several of the defendants appealed. Their notice of appeal was filed on November 7, 1952. No appeal was taken by Mrs. Annat. This Court reversed the district court and held that the Dooley Map, with its 800-acre sections and without any hiatuses, should have been adopted by the court as the guide to determination of the location and area of the land taken in condemnation. *Paradise Prairie Land Co. v. United States*, 5th Cir., 1954, 212 F.2d 170.

While the appeal of Paradise Prairie Land Co. was pending, a jury in the district court returned verdicts for several tracts not covered by the prior verdict and judgment. This verdict, returned on January 26, 1953, recited that Tract 114, consisting of the lands not otherwise particularly described, had a value of $1.00. On February 3, 1953, the court entered a judgment called "Final Judgment as to Tracts 379, 381, 385, 387, 388, 389 and 114." Judgment on this verdict was entered on February 3, 1953, finding a value of $1.00 as just compensation for Tract 114 and directing that upon the payment of that sum into the registry of the court title should vest in the United States. No intimation was given in the judgment as to how or by whom the $1.00 might be claimed. On April 13, 1953, the third final judgment was entered. It recited findings by the court that certain enumerated tracts, in-

cluding Tracts 317, 337 and 414 had been acquired through condemnation and just compensation had been paid to the owners. There was a finding that Tract 268 had been conveyed to the United States by the Trustees of the Internal Improvement Fund of the State of Florida. After these and other findings, it was adjudged, among other things, that the United States was the owner of the land as being within the perimeter incorporated in the judgment.

In 1957 Mrs. Annat commenced, in the Florida Circuit Court, an action of ejectment for the recovery from Daniel B. Beard of Tract 268, or the Township 59-1 hiatus lying in Range 36, claiming ownership and asserting that Beard was in wrongful possession. Beard, disclaiming any interest in his own right and identifying himself as Superintendent of the Everglades National Park, removed the cause to the United States District Court. The United States championed the cause of Beard, asserted that it was a necessary party and that, in legal effect, the suit was one against the United States without its consent and hence there was no jurisdiction. Both parties moved for summary judgment. On behalf of Beard it was contended that the condemnation proceedings included the hiatus land and that it acquired whatever interest Mrs. Annat had, that Mrs. Annat is bound by the condemnation judgment and that judgment is res judicata. Mrs. Annat urged that the United States claimed ownership of the hiatus land by deed from the State of Florida and did not acquire it or seek to acquire it in the condemnation decree and paid no compensation for it, that if the judgment in the condemnation case could be regarded as affecting her title to the hiatus it

was, in that respect, void, and finally, that the United States was not a necessary party.

While Mrs. Annat's suit against Beard was pending, she filed a motion in the condemnation proceeding under Rule 60(b)[1] seeking to be relieved of the judgment. The court denied the Rule 60(b) motion in the condemnation case and entered a summary judgment in the ejectment action in favor of the defendant Beard and his successor and co-defendant, Warren J. Hamilton, who had been added as a party. An appeal was taken from each of the judgments.

The land involved in the Paradise Prairie Land Co. case was the Township 59-1 hiatus in Section 36. If Mrs. Annat had appealed it may be assumed that she would have obtained the same successful result as did the appealing defendants. There is nothing to indicate that there would have been a different result as to her. But Mrs. Annat did not appeal. Although the so-called hiatus land of Paradise Prairie Land Co. adjoined the hiatus land of Mrs. Annat, there was no joint ownership between them, no award had been made to them jointly, and their only joint interest was in the proposition of law which Paradise Prairie had resolved for its benefit and Mrs. Annat did not. A reversal on appeal does not inure to the benefit of those who did not join in the appeal unless the

[illegible] Rule 60 [illegible]

interests of the non-appealing parties are so interwoven and dependent as to be inseparable. 5 C.J.S. 516, Appeal and Error § 1952; **Muskogee National Telephone Co. v. Hall**, 8th Cir. 1902, 118 F. 382. Cf. 30 C.J.S. 64, Eminent Domain, § 368. This principle seems particularly applicable in a condemnation case where a number of separate tracts with different ownerships are taken. While the proceeding, in such a case, is but one suit, it is a suit which joins separate and distinct causes of action.[2] The judgment upon the verdict by which the award to Mrs. Annat was made is res judicata as to Mrs. Annat and all that was held and decided by that judgment is binding upon her.

Mrs. Annat's counsel in the condemnation case participated in the pre-trial hearing which culminated in the adoption of Petitioner's Exhibit 1 as the map which fixed the location, dimensions and area of the land for which she was to receive compensation. During the trial before the jury for the fixing of compensation an effort was again made on Mrs. Annat's behalf to show that the land for which she was entitled to compensation should include the Range 36 portion of the Township 59½ hiatus. For reasons not here disclosed, but no doubt regarded by Mrs. Annat as sufficient, she chose not to appeal. The result and effect of the judgment by which Mrs. Annat is bound was, that the land owned by her comprised the described sections and parts of sections of 640 acres each as shown on Petitioner's Exhibit 1, and that she did not have any ownership of the Township 59-½ hiatus as shown on

[2] Atlantic Coast Line Railroad Co. v. United States, 5th Cir. 1943, 137 F. 2d 959. Cf. Rule 71 A Fed. Rules Civ. Proc., 28 U.S.C.A. ; Moore's Federal Practice, 2d ed. 2769, par. 71A .20.

[3] United States v. Rinner, 10th Cir. 1949, 174 F. 2d 651.

Petitioner's Exhibit 1. Unfortunate as it may appear in this particular case, the principle of res judicata requires us to hold that the situation of Mrs. Annat is not bettered by the Paradise Prairie Land Co. reversal. That principle of res judicata is applicable in condemnation cases. *See Ballou v. de Bretteville*, 9th Cir. 1959, 239 F. 2d 824, cert. den. 353 U. S. 917, 77 S. Ct. 825, 1 L. Ed. 2d 856.

Relief under Rule 60(b) was properly denied. The judgment, in so far as it affected Mrs. Annat's rights, was not a void judgment, nor is there any other valid reason justifying relief upon the judgment. Mrs. Annat's counsel, as we have already observed, were fully cognizant of the legal question involved in the adoption by the court of Petitioner's Exhibit 1. The ruling of the court in adopting that purpose fixing boundaries, boundaries and [illegible] became the law of the case and, since Mrs. Annat did not appeal, is controlled the law of the case so far as she is concerned, even though as was determined in the Paradise Prairie Land Co. case, the judgment was erroneous. However, it is not void, and not subject to being vacated under Rule 60(b)(4). The fact that the judgment was erroneous does not constitute any other reason justifying relief. [illegible] *United New York & Westchester Co. v. Bennett*, 5th Cir. 1954, 213 F. 2d 378. Cases in point is *Ackermann v. United States*, [illegible] 71 S. Ct. 209, 95 L. Ed. 57. There Ackermann and his wife, and his cousin Mrs. Keilbar, had been defendants in a denaturalization proceeding and judgments were entered cancelling their citizenship. From this judgment Keilbar appealed and, on stipulation of the United States, there was a reversal and the complaint as to Keilbar was dismissed. The Ackermanns did not appeal.

Thereafter the Ackermanns sought to vacate the judgment under Rule 60(b). The district court denied relief and this Court affirmed. *Ackermann v. United States*, 178 F. 2d 983, 179 F. 2d 236. The Supreme Court, in affirming, said:

> "Petitioner made a considered choice not to appeal . . . . His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong considering the outcome of the *Kelbar* case. There must be an end to litigation some day, and free, calculated and deliberate choices are not to be relieved from." 340 U. S. 193, 198. *See Collins v. City of Wichita*, 10th Cir. 1958, 254 F. 2d 837.

The motion for Rule 60(b) relief was properly denied.

The views which we have of these matters make it unnecessary to discuss the three "Final Judgments" in the condemnation suit. The judgment of May 26, 1952, which was the judgment reversed in *Pecaric v. Pecaric Land Co. v. United States*, *supra*, and the judgment of April 13, 1953, are both asserted and relied upon by the Government in the ejectment suit against Beard. It is from the judgment of April 13, 1953, that Mrs. Annat seeks relief by her Rule 60(b) motion. The judgment of May 26, 1952, adjudicated the location, boundaries and area of the Annat land and fixed the amount of the just compensation to be paid for it. Thus the requirements of finality and appeal-

ability are met. *Catlin v. United States*, 324 U. S. 229, 65 S. Ct. 631, 89 L. Ed. 911. Cf. *United States v. Richardson*, 5th Cir. 1953, 204 F. 2d 552. The judgment of April 13, 1953, merely confirmed the earlier judgment as to the matters there determined. Although the United States asserts that the 1953 judgment has quieted its title to all of the lands within the perimeter, we find no need to consider this contention.

The judgment of the district court in each of the cases is

AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By CLARA R. JAMES
Deputy

New Orleans, Louisiana

JUL 8 1960

JUDGMENT.

Extract from the Minutes of April 26, 1960.

ELIZABETH ANNA,

No. 17841 versus

DANIEL B. BEARD and WARREN J. HAMILTON.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellant, Elizabeth Anna, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

JUDGMENT.

Extract from the Minutes of April 26, 1950.

ELIZABETH ANNAT,

No. 17883 versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No. 262

In the Supreme Court of the United States

OCTOBER TERM, 1960

ELIZABETH ANNAT, PETITIONER

v.

DANIEL B. BEARD, WARREN J. HAMILTON AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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PERRY W. MORTON,
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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 262

ELIZABETH ANNAT, PETITIONER

v.

DANIEL B. BEARD, WARREN J. HAMILTON AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

OPINION

The opinion of the court of appeals (Pet. App. 1–13) is reported at 277 F. 2d 554.

JURISDICTION

The judgments of the court of appeals were entered on April 26, 1960 (Pet. App. 14–15). The petition for a writ of certiorari was filed on July 25, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, having decided not to appeal from a Federal condemnation judgment in favor of

the United States, is entitled six years later to be relieved from the judgment under Rule 60(b) of the Federal Rules of Civil Procedure on the ground that the judgment was erroneous and therefore the Government took private property without compensation.

RULE INVOLVED

Rule 60(b), Federal Rules of Civil Procedure, provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. * * *

STATEMENT

The petition brings up kindred rulings in a condemnation action and an ejectment action. The United States instituted the condemnation action to acquire a large area of land in Florida for inclusion in the Everglades National Park. The petition contained a perimeter description of the entire area including the land which is here in controversy. By amendment to that petition, the United States divided the lands within the perimeter boundary into numbered tracts. The descriptions of those tracts and the supposed owners of those the Government regarded as being privately owned were set forth[1] (R. 39–49). The descriptions were in terms of township, range, and section—in accordance with the conveyances by the State to the private owners—rather than natural boundaries, and were related to an official Government map of the area which showed 640-acre sections.

Use of 640-acre sections resulted in gaps called hiatuses appearing between some townships and some ranges. That situation derived from the fact that only a part of the area had been surveyed on the ground because of its swampy condition. The remainder had to be mapped by projections from a limited number of established survey points and lines. On account of this, there existed conflicting maps of the area. Some

[1] The State of Florida had once owned all of this land. It had conveyed some to private owners. Prior to the condemnation suit, it conveyed to the United States by quitclaim deed all of the land within the perimeter boundary which it still owned.

of the parties, including petitioner, claimed under maps or plats containing 800-acre sections. Such maps tended to eliminate hiatuses by placing all or most of such land within the adjacent sections.

Among the tracts listed and described by township, range, and section in the amended petition were Tracts 317 and 337, which were stated to be owned by petitioner. The land between these two sections, which is the area directly involved here, was designated tract 268 and was described and located as a hiatus between Townships 59 and 60 and was designated as being within hiatus Township 59½ (R. 42, 57; Pet. App. 5). In the amended condemnation petition, the United States expressly claimed title to this hiatus under its deed of the entire area from the State of Florida on the ground that it had not been conveyed by the State to any private ownership. The amended petition also stated (R. 11):

> "That because of the uncertainty of descriptions of tracts of lands hereinabove described, and the Petitioner's inability, in many instances, to properly identify lands by survey according to law, as well as for other reasons, Petitioner prays for the entry of a judgment in this proceeding which will cover all lands within the perimeter boundary of the Park (notwithstanding that deeds to Petitioner to certain portions thereof may have been duly executed and delivered and recorded) and which will adjudicate that the fee simple title to all of the land described in Exhibit "A" to this Petition (as hereby amended) has vested in the United States of America subject only

to [certain specific reservations not here material].

Subsequently, a declaration of taking was filed which included most of the tracts. It did not include tracts claimed by the United States or tracts as to which compensation had been settled. The sum of $45,000 was deposited as estimated just compensation for Tracts 317 and 337. As shown by an attached plat, that deposit did not apply to the hiatus area (Tract 268) between those tracts (R. 57; Pet. App. 5).

Petitioner answered the amended petition, stating that the land claimed by her contained 31,860 acres (R. 70). This included the hiatus area since she claimed that there was no hiatus. She denied "the allegation of Petitioner that any part or portion of the land herein described is sovereignty land" and alleged that her property was "not properly or sufficiently described by petitioner, and that no adequate survey has been made of this or other property within the area designated as Everglades National Park, but that petitioner, on July 3rd, 1947 and January 6, 1948, and dates subsequent thereto compiled, published and circulated maps on said property" (R. 69–70). Other landowners also challenged the validity of this hiatus which, as the Government claimed, extended for some distance.

Since it was necessary to settle the issue of ownership, location and acreage before valuation proceedings could be held of judgment in condemnation entered, the district court conducted a pretrial hearing to determine whether the Government's map con-

taining the 640-acre sections should be authenticated as an accurate representation of the physical location on the ground of the property in the Park area or whether the defendant's maps containing 800-acre sections should govern. On July 2, 1951, following a lengthy trial (922 pages of reporter's transcript) at which nine counsel for several landowners, including petitioner, actively participated, the district court found and ordered that the Government's map showing the location of the lands sought to be acquired should govern in the trial to determine just compensation (R. 73-79).

On May 26, 1952, following a jury trial, the court entered a "Final Judgment" awarding compensation for 23 tracts, including Tracts 317 and 337, and vesting title in the United States (R. 81-90). The owners of three tracts (not including petitioner) appealed on November 7, 1952, from that judgment on the ground that the district court had erred in adopting the Government's maps. On April 5, 1954, the Fifth Circuit reversed the district court, holding that it should have authenticated and used a map containing 800-acre sections, which had been in use for thirty-six years as a basis for conveyances. *Paradise Pawnee Land Co.* v. *United States*, 212 F. 2d 170.

In the meantime, on April 13, 1953, an overall, single final judgment, as prayed for in the Government amended petition, was entered which embraced (a) all the tracts as to which "Final Judgments" had already been "entered herein," including Tracts 317 and 337; (b) all tracts (including hiatus Tract 268) as to which the court found that "the allegations of

the Petition for Condemnation, as amended, are true" so that they were conveyed to the United States by the deed from Florida; and (c) all tracts voluntarily conveyed by private owners to the United States (R. 100–126). On that basis, the court ordered that the United States was the owner of all lands within the perimeter boundary of the Park, which it set forth by courses and distances.

Four years later, on April 15, 1957, petitioner filed the present ejectment action against Daniel B. Beard, the Park Superintendent, to acquire possession of the land embraced in Tract 268 and for $100,000 estimated profits. The Superintendent answered setting forth, among other defenses, the condemnation proceedings which embraced this land and the final judgments of May 26, 1952, and April 13, 1953, holding that petitioner had no title and that title was in the United States (R. 11–13).[1] On July 25, 1958, petitioner filed a motion in the condemnation action under Rule 60(b)(4) and (6), F.R. Civ. P., to be relieved from the judgment of April 13, 1953 (R. 141). The district court denied this motion and, in the ejectment action, granted defendants' motion for summary judgment (R. 25–26, 157).

On appeal, the court of appeals affirmed both rulings of the district court. It held that petitioner was

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[1] The compensation owing the owners who successfully appealed was later settled by agreement.

This action was commenced in the State Court for Dade County, Florida, and later removed to the federal district court in accordance with 28 U.S.C. 1442(a)(1) and 1446. Daniel B. Beard was originally the only defendant named. Subsequently, petitioner added Warren J. Hamilton, who succeeded Beard as Park Superintendent.

bound by the judgment of May 26, 1952, under ordinary principles of *res judicata*. The court further held that, even assuming that petitioner "would have obtained the same result as did the appealing defendants" in the *Paradise Prairie Land Co.* case, *supra* (Pet. App. 9), she is not entitled under Rule 60(b)(4) or (6) to be relieved from the judgment which she chose not to appeal.

ARGUMENT

Petitioner is bound by the judgment of May 26, 1952, declaring that the land in question belongs to the United States. The only basis for relief from such a final judgment is under Rule 60(b) of the Federal Rules of Civil Procedure, *supra*, p. 2. But Rule 60(b) is clearly not applicable.

1. Petitioner's motion under Rule 60(b) relied on clauses (4) and (6). Clause (4), however, requires that the prior judgment be void. Here, even if we assume, as did the court of appeals, that the district court judgment was erroneous, the judgment was still not void. Otherwise, Rule 60(b)(4) would, without any time limitation, substitute for appeal since by hypothesis all judgments which would be reversible on appeal are erroneous. Likewise, Rule 60(b)(6), which allows relief for "any other reason justifying relief from the operation of the judgment"—may not be used as a substitute, six years later, for a deliberate decision not to appeal. As this Court held in a similar situation in *Ackermann* v. *United States*, 340 U.S.

193, 198;[1] "Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong, considering the outcome of the *Keilbar* case. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." Accord, *Title* v. *United States*, 263 F. 2d 28, 30-31 (C.A. 9), certiorari denied, 359 U.S. 989; *Collins* v. *City of Wichita, Kansas*, 254 F. 2d 837 (C.A. 10); *Elgin National Watch Co.* v. *Barrett*, 213 F. 2d 776, 779-780 (C.A. 5); *Berryhill* v. *United States*, 199 F. 2d 247 (C.A. 6); cf. *Sunal* v. *Large*, 332 U.S. 174;[2]

[1] Actually, petitioner has far less justification than did petitioners in *Ackermann* in asking to be relieved from the earlier judgment. There, allegations were made that pressing financial considerations influenced the decision not to appeal, and that the Ackermanns relied on the advice of a government official which carried with it the implied claim that governmental interference frustrated appeal. The dissenters in *Ackermann* believed that these allegations, if proved, entitled relief from the judgment that did not disagree with the necessity of the fundamental proposition that a freely made decision not to appeal may not be remedied at a later day by a motion under Rule 60(b). Since, petitioner in this case offers no excuse for failure to appeal, she has no basis, even according to the view of the dissenters in *Ackermann*, for relief under Rule 60(b).

Keilbar was a co-defendant of the Ackermanns who appealed from the judgment and won a reversal. Petitioner is in a like situation since landowners similarly situated were successful on appeal in the *Paradise Process Land Co.* case, *supra*.

[2] A similar issue, in a denaturalization context, is now before the Court in *Polites* v. *United States*, No. 25, this Term, certiorari granted, 361 U.S. 958, and will be more extensively discussed in the brief which the Government will file in that case. Accordingly, the Court may wish to withhold action on this petition until the decision in *Polites*.

Petitioner, however, contends (Pet. 2, 5, 9, 10) that the United States has taken her property without due process of law and without compensation and that both courts below overlooked these "constitutional aspects of the cause." But even if these allegations were true, errors by the district court on constitutional issues, like on all other issues, must be remedied by appeal, not by moving, six years after judgment, under Rule 60(b). Since she chose not to appeal for reasons which, as the court of appeals said, were "no doubt regarded by Mrs. Annat as sufficient" (Pet. App. 10), it was her responsibility, not the Government's, that she did not receive the same relief as the appellant landowners in *Paradise Prairie Land Co.* v. *United States*, *supra*.

2. Petitioner asserts (Pet. 10) that Tract 268 "was not condemned, it was not included in the Declaration of Taking, there was no compensation deposited or paid, no trial as to its value, no order granting possession and no adjudication as to its ownership save and except an 'ex parte judgment' entered without notice to or knowledge of the owner." Those assertions are either erroneous or ineffectual. Tract 268 (the hiatus) was included in the condemnation complaint, petitioner's claim of ownership was fully litigated at the pre-trial hearing, and the judgment of May 26, 1952, adjudicated petitioner's claim of ownership to this tract. The judgment was final and appealable as to petitioner's ownership because it had the effect of dismissing her from the case as to Tract 268.

Tract 268 was not included in the declaration of taking because the filing and extent of a declaration of taking are optional with the Government and, in this instance, the Government believed that it already had title to the tract. For that reason, also, there was no occasion for depositing estimated compensation or requesting an order for possession. Similarly, there was no reason for including Tract 268 in the valuation trial, since the Government's map, which the court adopted, showed that petitioner did not own Tract 268, no other claimant was of record or appeared, and the court had already determined that it was embraced in the deed to the Government from the State.

Petitioner impugns the overall judgment of April 13, 1953, stating that the State of Florida had conveyed Tract 268 to the United States as "an ex parte judgment entered without notice to or knowledge of the owner." Pet. 10. But this judgment did not affect or alter the earlier judgment of May 26, 1952, which awarded petitioner compensation for Tracts 317 and 337, in accordance with the order of July 2, 1951, which in turn had determined that Tracts 317 and 337 were the only acreage which the State conveyed to petitioner's predecessor. In terms, the April 13, 1953, judgment referred to the earlier May 26, 1952, judgment as a "Final" judgment and as a matter already done. The purpose of the April 13, 1953, judgment was obviously to meet the request in the Government's petition for a single, omnibus judgment embracing all land within the perimeter boundary of the Park (see the Statement, *supra*, pp. 4-5).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied. However, in view of the pendency of the *Polites* case (No. 25) involving a similar issue, the Court may wish to defer action on this petition until the disposition of that case.[7]

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AUGUST 1960.

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[7] See footnote 6, *supra*, p. 9.

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